

EXHIBIT G

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SUTTER WEST BAY HOSPITALS, doing business as
CALIFORNIA PACIFIC MEDICAL CENTER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

WAYNE RUDEN,) NO. 4:15-cv-05189-JSW
)
Plaintiff,) OPPOSITION OF DEFENDANT
) CALIFORNIA PACIFIC MEDICAL
vs.) CENTER TO BARD DEFENDANTS'
) MOTION FOR STAY

C.R. BARD, INC., a New Jersey) corporation; BARD PERIPHERAL VAS-) Date: January 8, 2016
CULAR, INC., (a subsidiary and/or) Time: 9:00 a.m.
division of defendant C.R. BARD,) Courtroom: 5, Second Floor
INC.) an Arizona Corporation;) Judge: Hon. Jeffrey S.
CALIFORNIA PACIFIC MEDICAL CENTER;) White
and DOES 1-100, inclusive,)
)
Defendants.)

Defendant, SUTTER WEST BAY HOSPITALS, doing business as
CALIFORNIA PACIFIC MEDICAL CENTER, incorrectly named as "CALIFORNIA
PACIFIC MEDICAL CENTER" (hereinafter "CALIFORNIA PACIFIC") hereby
submits the following Memorandum of Points and Authorities in
Opposition to Defendants C.R. BARD, INC.'s and BARD PERIPHERAL
VASCULAR, INC.'s Motion to Stay All Proceedings.

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TABLE OF CONTENTS

	<u>Page(s)</u>
I. <u>INTRODUCTION</u>	1
II. <u>FACTUAL & PROCEDURAL BACKGROUND</u>	2
A. Personal Injury Complaint by California Resident Against a California Corporation Filed in California State Court	2
1. CPMC is a California Corporation	2
2. Allegations Against All Named Defendants	2
3. CPMC Was Served Before Removal	3
B. BARD Defendants Remove on Claim of Diversity Jurisdiction	4
III. <u>LEGAL ANALYSIS</u>	4
A. Complete Diversity Necessary to Exercise Jurisdiction	5
B. "Fraudulent Misjoinder" Does Not Exist in the Ninth Circuit	6
1. Court May Not Apply Law That Does Not Exist	6
2. Majority of District Courts Decline to Adopt Fraudulent Misjoinder	8
3. <i>Tapscott</i> Reasoning Requires Egregious Joinder	10
IV. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

CASES

Page (s)

<i>Abrego v. Dow Chem. Co.</i> , 443 F.3d 676 (9th Cir. 2006)	4
<i>Caterpillar Inc. v. Lewis</i> , 519 U.S. 61 (1996)	5
<i>Caterpillar, Inc. v. Williams</i> , 482 U.S. 386 (1987)	5
<i>Cohen v. Office Depot, Inc.</i> , 204 F.3d 1069 (11th Cir. 2000)	7
<i>Dent v. Lopez</i> , 2014 WL 3057456 (E.D.Cal. July 7, 2014)	7
<i>Dent v. Lopez</i> , 2014 WL 3838837 (E.D.Cal. July 30, 2014)	9
<i>Early v. Northrop Grumman Corp.</i> , 2013 WL 3872218 (C.D.Cal. July 24, 2013)	6, 7
<i>Gaus v. Miles</i> , 980 F.2d 564 (9th Cir. 1992)	4, 6
<i>Goodwin v Kojian</i> , 2013 WL 1528966 (C.D.Cal. 2013)	10
<i>Hill v. C.R. Bard, Inc.</i> , 2008 WL 4615609 (C.D.Ill. Aug. 26, 2008)	10
<i>Jones v. Pfizer</i> , 2012 WL 1029518 (N.D.Cal. March 26, 2012)	7-9, 11
<i>Jurin v. Transamerica Life Ins. Co.</i> , 2014 WL 4364901, (N.D.Cal. Sept. 3, 2014)	7
<i>Leite v. Crane Co.</i> , 749 F.3d 1117 (9th Cir. 2014)	6
<i>Lopez v. Pfeffer</i> , 2013 WL 5367723 (N.D.Cal. Sept. 25, 2013)	7
<i>McCabe v. Gen. Foods Corp.</i> , 811 F.2d 1336 (9th Cir. 1987)	6
<i>Palmer v Davol, Inc.</i> , No. 08-cv-02499-ML 2008 WL 5377991 (D.R.I. Dec. 23, 2008)	10

1	<i>Perry v Luu</i> , No. 1:13-CV-00729-AWI-JLT	
	2013 WL 3354446 (E.D.Cal. July 3, 2013)	10
2		
	<i>Ramirez v. Our Lady of Lourdes Hospital</i> , No. 2:13-cv-01108-RSM	
3	2013 WL 5373213 (W.D. Wash Sept. 25 2013)	8
4	<i>Shears v. Park</i> , No. 1:13-cv-01298-AWI-JLT	
	2013 WL 5492257 (E.D.Cal. Oct. 1, 2013)	9
5		
	<i>Tapscott v. MS Dealer Serv. Corp.</i> ,	
6	77 F.3d 1353 (11th Cir. 1996)	7
7	<i>Watson v Gish</i> , No. C 10-03770 SBA	
	2011 WL 2160924 (N.D.Cal. June 1, 2011)	9, 11
8		
9		
	<u>STATUTES</u>	
10	28 U.S.C. § 1332(a)	5
11	Cal. Code Civ. Proc. § 415.30	4

I.

INTRODUCTION

This is an action for personal injury which was initially filed in the San Francisco Superior Court against CALIFORNIA PACIFIC, a California Corporation ("CPMC"), and against C.R. BARD, Inc., and BARD PERIPHERAL VASCULAR, INC. (collectively "BARD").

CPMC opposes co-defendant BARD's motion to stay all proceedings as moot.

BARD removed the action asserting diversity jurisdiction. But the parties are not diverse. CPMC is a California corporation, and plaintiff is a resident of California. Having been improperly removed to federal court, CPMC must now face the prospect of defending itself in a foreign jurisdiction, the Central District of Arizona. Granting BARD's motion to stay would be inequitable to CPMC.

BARD contends that all of this can be sorted out in federal court in Arizona. Not so fast. Before the Court can decide whether to stay this case, it must first determine whether it can exercise jurisdiction. BARD removed this case by asserting that CPMC was "fraudulently misjoined." This Court must first determine whether that distinct and limited concept -- not recognized by the Ninth Circuit -- applies in these circumstances. It does not.

This case was improperly removed and this Court lacks jurisdiction over the dispute. The Motion to Stay is therefore moot and should be denied.

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II.

FACTUAL & PROCEDURAL BACKGROUND

A. Personal Injury Complaint by California Resident Against a California Corporation Filed in California State Court

1. CPMC is a California Corporation

Plaintiff filed a Complaint for Damages in San Francisco Superior Court on October 7, 2015. [Case No. 4:15-cv-05189-JSW, Document 1 at p.1:22-24; Document 1-2 at pp. 12-38.] Plaintiff is a resident of San Francisco, California. [Document 1-2 at p.13:19-20.] Defendant CPMC is a fictional business name of SUTTER WEST BAY HOSPITALS, a California Corporation. [See, Request for Judicial Notice in Support of CPMC's Opposition ("RJN"), filed concurrently herewith and incorporated herein by reference, at ¶ 1; see also, Business Entity Detail, attached as Exh. 1 to the RJN.]

2. Allegations Against All Named Defendants

The Complaint begins with lengthy general allegations against all defendants, including portions on inferior vena cava filters, BARD recovery filters, the failure of such filters and all defendants' alleged knowledge of such failures. [Document 1-2 at pp. 16:1-22:18.] In each separate cause of action, plaintiff alleges and incorporates each allegation of every other cause of action. [See e.g., Document 1-2 at p. 35:12-13.]

In March 2004, plaintiff underwent surgery at CPMC during which a medical device known as a BARD Recovery Filter ("BRF") was implanted in his inferior vena cava. [Document 1-2 at p. 16:3-13.] Plaintiff alleges that "the BRF was plagued with manufacturing and design defects which caused it to experience a significant rate of fracture and migration of the device," and that "as early as 2003,

1 the Defendants were made aware that the BRF was flawed and was
2 causing injury and death to patients who had the filter implanted in
3 their bodies." [Document 1-2 at p. 18:10-26.] Plaintiff further
4 alleges that on August 9, 2010, the FDA issued a warning letter
5 regarding the device inserted in plaintiff, and "advised treaters to
6 consider the risks and benefits of filter removal for each patient"
7 [Document 1-2 at p. 26:7-9.] Plaintiff alleges "on information and
8 belief" that CPMC received this warning. [Document 1-2 at p.
9 26:12.] Plaintiff allegedly discovered that the BRF had fractured,
10 causing injuries, in about March 2015. [Document 1-2 at p. 20:4-6.]

11 Plaintiff alleges the First, and Third through Eighth causes
12 of action against BARD, for negligence, strict liability for failure
13 to warn, strict product liability based on design defect, strict
14 product liability based on manufacturing defect, breach of warranty
15 of merchantability, and negligent misrepresentation against the
16 manufacturers of the allegedly defective product. [Document 1-2 at
17 pp. 22:19-25:20, pp. 26:19-24:12.]

18 Against CPMC, plaintiff alleges the Second, Ninth and Tenth
19 causes of action, for negligence and for breach of fiduciary duty.
20 [Document 1-2 at pp. 25:21-26:20.] The Tenth cause for negligence,
21 recall/retrofit is waged against all three named defendants.
22 [Document 1-2 at pp. 35:9-36:5.]

23 3. CPMC Was Served Before Removal

24 BARD alleges that the agent for service of process for C.R.
25 BARD, INC. received a copy of the Complaint and a California
26 Judicial Council form of Notice and Acknowledgment on October 13,
27 2015. [Document 1 at pp. 1:27-2:1.] BARD further alleges that an
28 agent signed and returned the Notice and Acknowledgment on October

1 28, 2015. [Document 1 at pp. 2:1-2.] Although BARD does not state
2 so, the agent for service of process on C.R. Bard, Inc. is in Los
3 Angeles, California. [Document 1-2 at p. 6, ¶ 4.]

4 BARD also alleges that BARD PERIPHERAL VASCULAR, INC. had not
5 been served with the Complaint by the time of removal. [Document 1
6 at pp. 2:2.]

7 But plaintiff mailed the Complaint to CPMC in the same manner
8 as it served C.R. BARD, INC. According to plaintiff's Notice and
9 Acknowledgment citing California Code of Civil Procedure section
10 415.30, plaintiff mailed a copy of the Summons and Complaint to
11 CPMC's agent for service of process on October 8, 2015. The form was
12 not signed by CPMC before the action was removed. [See, plaintiff's
13 Notice and Acknowledgment, attached as Exhibit 2 to the RJN.]

14
15 B. BARD Defendants Remove on Claim of Diversity Jurisdiction

16 BARD removed the action to federal court on November 12, 2015
17 (then modified removal on November 13, 2015). [Document 1.] BARD
18 asserts that CPMC had yet to be served with the Summons and
19 Complaint as of the date of removal. [Document 1 at p. 2:18-19.]
20 But BARD also asserts that even if CPMC was served that BARD did not
21 need to obtain the consent of CPMC to the removal since BARD claims
22 CPMC was "fraudulently misjoined." [Document 1 at p.2:24-25.]

23
24 III.

25 LEGAL ANALYSIS

26 BARD removed this case on an improper assertion of diversity
27 jurisdiction. Removal statutes are strictly construed (*Gaus v.*
28 *Miles*, 980 F.2d 564, 566 (9th Cir. 1992)), and the party seeking

1 removal bears the burden of proving its propriety. *Abrego v. Dow*
2 *Chem. Co.*, 443 F.3d 676, 683-85 (9th Cir. 2006).

3 BARD cannot meet its burden to establish diversity
4 jurisdiction. The parties are not diverse: plaintiff resides in
5 California and CPMC is a California corporation. Since CPMC was
6 served with a copy of the Summons and Complaint before BARD removed
7 the case, jurisdiction may be exercised only if BARD can prove an
8 exception to the requirement of complete diversity. It cannot.
9 BARD relies on the questionable concept of "fraudulent misjoinder,"
10 a doctrine that has not been adopted, approved or applied by the
11 Ninth Circuit. Even if the concept had been approved by our Circuit
12 Court of Appeals, the misjoinder alleged does not approach the
13 egregious level required for the application.

14 This Court lacks diversity jurisdiction and BARD's motion to
15 stay is therefore moot.

16
17 A. Complete Diversity Necessary to Exercise Jurisdiction

18 BARD removed this action on an improper assertion of diversity
19 jurisdiction. A defendant has the right to remove a matter to
20 federal court where the District Court would have original
21 jurisdiction. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392
22 (1987). The District Court has original jurisdiction over actions
23 in which there is complete diversity of citizenship. *See*, 28 U.S.C.
24 § 1332(a). Thus, plaintiffs must be citizens of different states
25 than each of the defendants. *Caterpillar Inc. v. Lewis*, 519 U.S.
26 61, 68 (1996).

27 "[A] defendant seeking to remove an action may not offer mere
28 legal conclusions; it must allege the underlying facts supporting

1 each of the requirements for removal jurisdiction." *Leite v. Crane*
2 *Co.*, 749 F.3d 1117, 1122 (9th Cir. 2014) (citing *Gaus v. Miles*,
3 *supra*, 980 F.2d at 567). "Federal jurisdiction must be rejected if
4 there is any doubt as to the right of removal in the first
5 instance." *Gaus, supra*, 980 F.2d at 566.

6 CPMC was served before BARD removed the case. BARD does not
7 and cannot allege that CPMC joined in or approved of the removal.
8 The presence of CPMC, a California corporation, destroys diversity
9 where the plaintiff is likewise from California. BARD therefore
10 must assert and prove an exception to the requirement of complete
11 diversity. BARD claims that CPMC was "fraudulently misjoined."

12 The Ninth Circuit recognizes a related doctrine, that of
13 fraudulent joinder. Under that doctrine, "a defendant's presence in
14 a lawsuit may be ignored for the purposes of determining diversity
15 if the court finds that the plaintiff either fails to state a claim
16 against that defendant or fraudulently states jurisdictional facts."
17 *See, Early v. Northrop Grumman Corp.*, 2013 WL 3872218, at *2 (C.D.
18 Cal. 2013) (citations omitted). "Fraudulent joinder is a term of
19 art," which does not require an ill motive by plaintiff. *McCabe v.*
20 *Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987) ("If the
21 plaintiff fails to state a cause of action against a resident
22 defendant, and the failure is obvious according to the settled rules
23 of the state, the joinder of the resident defendant is fraudulent").

24
25 B. "Fraudulent Misjoinder" Does Not Exist in the Ninth Circuit

26 1. Court May Not Apply Law That Does Not Exist

27 BARD's removal does not rely on the well-settled doctrine of
28 fraudulent joinder. Instead, BARD maintains that its removal

petition is based on "fraudulent misjoinder," a concept first articulated by the Eleventh Circuit in *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), overruled on other grounds by *Cohen v. Office Depot, Inc.*, 204 F.3d 1069 (11th Cir. 2000). A court applying the concept of "fraudulent misjoinder" would disregard the non-diverse plaintiff's citizenship when determining jurisdiction if the two Claims are not sufficiently related to one another. Fraudulent misjoinder "recognizes situations where plausible claims have been asserted, but joinder is improper nonetheless due to a lack of some real connection between the defendants." *N.C. ex rel. Jones v. Pfizer, Inc.*, 2012 WL 1029518, at *3 (N.D.Cal. 2012).

The Ninth Circuit "has not adopted, approved, nor applied," the theory of fraudulent misjoinder. *Jurin v. Transamerica Life Ins. Co.*, 2014 WL 4364901, at *3 (N.D.Cal. 2014). The concept of fraudulent misjoinder "is simply inoperative in this circuit." *Dent v. Lopez*, 2014 WL 3057456, at *6 (E.D.Cal. 2014). District courts throughout the circuit have consistently declined to adopt the doctrine. See, e.g., *Early v. Northrop Grumman Corp.*, 2:13-CV-3130-ODW MRW, 2013 WL 3872218, at *2 (C.D.Cal. 2013) ("fraudulent misjoinder is a recent and unwarranted expansion of jurisdiction ... which the Court is not inclined to adopt"). Given that the "Ninth Circuit has not adopted the *Tapscott* rationale, nor has any other court in our district adopted the fraudulent misjoinder theory," BARD based its removal "on law that does not exist in this district." *Lopez v. Pfeffer*, 2013 WL 5367723, at *2 (N.D.Cal. 2013).

//

1 2. Majority of District Courts Decline to Adopt Fraudulent
2 Misjoinder

3 District courts frequently face the question of whether to
4 apply the concept of fraudulent misjoinder in circumstances similar
5 to those presented here. A medical device manufacturer or a
6 pharmaceutical company is sued in state court by a plaintiff who has
7 also served a non-diverse co-defendant, such as medical doctor who
8 recommended or performed a procedure to place the device or the
9 hospital where the procedure took place. Frequently, as here, these
10 cases allege the failure to warn of side effects of the use of the
11 device or drug. BARD implies that many District Courts located in
12 the Ninth Circuit have utilized the Eleventh Circuit's concept of
13 fraudulent misjoinder. The opposite is true. Most decisions have
14 decided against applying the prolix and unnecessary tests required
15 in considering "fraudulent misjoinder."

16 Northern District Judge Alsup decided against applying
17 "fraudulent misjoinder" in *N.C. ex rel. Jones v. Pfizer, Inc.*, 2012
18 WL 1029518 (N.D. Cal. 2012). Plaintiff claimed injury due to side
19 effects of the use of Dilantin, and sued the maker (Pfizer) and
20 Children's Hospital, Oakland, in Alameda County Superior Court.
21 Pfizer removed the case to the Northern District. *Id.* at *1.

22 In deciding against applying "fraudulent misjoinder," the
23 Court there considered: (1) the Ninth Circuit has not adopted the
24 doctrine; (2) the weight of other District Court decisions declining
25 to apply it; and (3) that the level of alleged misjoinder did not
26 approach a level of egregiousness needed to pass the *Tapscott* test.
27 *Id.* at *2-3. See, *Ramirez v. Our Lady of Lourdes Hosp.*, 2013 WL
28 5373213 (W.D. Wash 2013) (applying Judge Alsup's reasoning to remand).

Jones v. Pfizer, 2012 WL 1029518, cited another Northern District Court decision, *Watson v Gish*, 2011 WL 2160924 (N.D.Cal. 2011). That case, as here, involved a removal of a personal injury case filed in San Francisco Superior Court against a drug manufacturer, a doctor, and CALIFORNIA PACIFIC. The *Watson* court declined to adopt or apply the "fraudulent misjoinder" test proposed by the drug manufacturer, Novartis, stating "*Tapscott* is readily distinguishable." *Id.* at *4. The *Watson* court ruled:

[T]he instant case does not involve two distinct classes that have 'no real connection' to each other. To the contrary, there is only one plaintiff whose claims arise from adverse reactions she suffered allegedly as a result [of] the Healthcare Defendants' administration of a medication produced by fellow defendant Novartis.

Id. As the *Watson* Court ruled, so should this Court. There is no reason to adopt and apply the concept of "fraudulent misjoinder."

Courts in other California federal districts have likewise decided against adopting "fraudulent misjoinder" in circumstances similar to that facing this Court. Many of these Courts have ruled that they must first make a determination on jurisdiction before ruling on motions to stay or to sever. *See, Shears v. Park*, 2013 WL 5492257, *5 (E.D.Cal. 2013) ("The Court finds the concept of fraudulent misjoinder to be faulty, and is confounded by the concept's circular logic in that it requires the Court first-in full recognition of the lack of diversity jurisdiction-sever part of the case and only then find it has jurisdiction"); *Dent v. Lopez*, 2014 WL 3838837, *3 (E.D.Cal. 2014) ("The Court agrees ... to abide by 'its historical obligation to determine jurisdiction before taking adjudicative action'")^{1/}; *Perry v Luu*, 2013 WL 3354446, *5 (E.D.Cal.

^{1/} In that action, C.R. BARD, INC. was a defendant represented by the Los Angeles office of Reed Smith, BARD's counsel here.

1 2013) (no need to expand removal jurisdiction absent showing state
2 court is incompetent to determine misjoinder); *Goodwin v Kojian*,
3 2013 WL 1528966, *5 (C.D.Cal. 2013) (defendant better served to seek
4 relief from alleged misjoinder in state court than by removal).

5 This is neither the first time, nor the only forum, where BARD
6 and its related companies have unsuccessfully argued for "fraudulent
7 misjoinder." Many of these cases turn on decisions against adopting
8 "fraudulent misjoinder" in the absence of Circuit Court guidance.
9 *See, Hill v. C.R. Bard, Inc.*, 2008 WL 4615609, *6 (C.D.Ill. 2018);
10 *Palmer v Davol, Inc.*, 2008 WL 5377991, *4 (D.R.I. 2008). It is
11 unnecessary for the Court here to validate BARD's strategy in
12 seeking what it considers a favorable forum.

13 3. Tapscott Reasoning Requires Egregious Joinder

14 In *Tapscott*, the lack of connection between claims arose from
15 two different categories of putative classes of plaintiffs. The
16 first class consisted of claims by plaintiffs who "alleged
17 violations arising from sales of service contracts in connection
18 with the sale of automobiles, [and] the second amended complaint
19 alleged [an additional class for] violations of the Alabama Code ...
20 arising from the sale of 'extended service contracts' in connection
21 with the sale of retail products." *Id.* Thus, two entirely separate
22 class actions being joined. The only real connection was that both
23 defendant classes had engaged in alleged fraudulent business
24 practices under the same Alabama statute.

25 The Eleventh Circuit held that the procedural misjoinder
26 exception applies "where a diverse defendant is joined with a
27 nondiverse defendant as to whom there is no joint, several or
28 alternative liability and where the claim against the diverse

1 defendant has no real connection to the claim against the nondiverse
2 defendant." *Id.* at 1360. In applying the rule of procedural
3 misjoinder, the court stated "[w]e do not hold that mere misjoinder
4 is fraudulent joinder, but we do agree with the district court that
5 Appellants' attempt to join these parties is so egregious as to
6 constitute fraudulent joinder." *Id.* Thus, in order to rise to the
7 level of procedural misjoinder, the misjoinder must be egregious.

8 Plaintiff's joinder as defendants of the manufacturer of a
9 medical device and the hospital where the device was implanted does
10 not approach the level of egregious conduct sufficient to even apply
11 the *Tapscott* concept. *Watson v. Gish, supra*, 2011 WL 2160924 at *4;
12 *Jones v. Pfizer, supra*, 2012 WL 1029518 at *4.

13
14 IV.

15 CONCLUSION

16 The Court must first determine it has jurisdiction before
17 making a ruling on a matter of substance.

18 Diversity is lacking here, and there is no legal basis to
19 permit BARD to skirt this fatal defect, let alone to compel the
20 Court to adopt a concept that is not adopted, approved or applied by
21 the Ninth Circuit.

22 Therefore, this Court lacks jurisdiction, and BARD's Motion to
23 Stay is moot.

24 DATED: December 1, 2015

DAVIDOVITZ + BENNETT

25
26 By: _____/s/

27 HILARY E. YOUNGBLOOD
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